Case No. 961314 FEB 5 1997

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

In re: EDWARD W. ENGLANDER, and
PHYLLIS S. ENGLANDER,
Petitioners,

v.

GEORGE E. MILLS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT AUGUSTUS HARPER
Robert Augustus Harper
Law Firm, P.A.
325 West Park Avenue
Post Office Box 10132
Tallahassee, Florida 32302-2132
(904) 224-5900/fax (904) 224-9800
FL Bar No. 127600
GA Bar No. 328360
COUNSEL FOR PETITIONERS

78 pp

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether principles of federal equity law can force a sale of a homestead ordinarily protected from general creditors by the organic law of the State under the Due Process Clause simply because a citizen seeks bankruptcy protection?

2. Whether in a case of first impression the highest state court, in this case the Supreme Court of Florida, should decide a local constitutional homestead exemption issue rather than a federal court in a bankruptcy proceeding?

B. PARTIES INVOLVED

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here are: (1) George E. Mills, Jr., Trustee; (2) First Union National Bank of Florida, Creditor; and (3) Transamerica Commercial Finance Corporation, Creditor.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. Table of Contents

A. QUESTIONS PRESENTED FOR REVIEW i

B. PARTIES INVOLVED ii

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES iii

1. Table of Contents iii

2. Table of Authorities v

D. CITATIONS TO OPINIONS BELOW 1

E. JURISDICTION 1

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

1. Constitutional provisions 2

2. Statutory provisions 2

G. STATEMENT OF THE CASE 4

1. The Basis for Jurisdiction Below 4

2. Facts Pertinent to the Questions Presented 6

3. Course of the Proceedings. 9

H. REASONS FOR GRANTING THE WRIT 13

1. Property rights organic in the constitution of the State are not preempted simply by a citizen filing for bankruptcy protection as federal equity principles are not automatically triggered by filing a petition 13

2. The State court of highest resort should first be allowed to address the rights of general creditors against a constitutionally protected homestead under the State's exemption scheme rather than a federal court imposing a federal rule of equity 17

I. CONCLUSION 21

2. Table of Authorities

Cases **Page**

Barnhill v. Johnson, 503 U.S. 393, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992) 19

Butner v. United States, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) 14-16, 20

In re Englander, 156 B.R. 862 (Bankr.N.D. Fla. 1992) 1, 9

In re Englander, 95 F.3d 1028 (11th Cir. 1996). 1, 6, 12, 16-18

In re Persky, 134 B.R. 81 (Bankr. E.D. N.Y. 1991) . . . 8

In re: McCollam, 986 F.2d 436 (11th Cir. 1993), *question certified*, 955 F.2d 678 (11th Cir. 1992) 12

Lewis v. Manufacturers National Bank, 364 U.S. 603, 81 S.Ct. 347, 5 L.Ed.2d 323 (1961) 15

Miskin v. City of Ft. Lauderdale, 661 So.2d 415 (Fla. 4th DCA 1995) 14

Owen v. Owen, 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1990) 13

Smith v. Guckenheimer, 42 Fla. 1, 27 So. 900 (1900) . . 17

Sturges v. Crowninshield, 4 Wheat. 122,

4 L.Ed. 529 (1819) 15

Statutes, Rules and Constitutional Provisions

11 U.S.C. §522 (1990) 2, 3

11 U.S.C. §522(f)(3)(B) 13

28 U.S.C. §1254(1) 2

28 U.S.C. §1334 4

28 U.S.C. §157(b)(2)(B) 4

28 U.S.C. §158(d) 5

Pub.L. 103-394, Title I, §108(d) 3

Other Authorities

Constitution of the State of Florida, Article X, §4. 7

Constitution of the United States, Article I, §8 14

Constitution of the United States, Article V 2

Constitution of the United States, Article X 2

Federal Rules of Appellate Procedure Rule 4(a) 5

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 19 September 1996, rehearing denied 08 November 1996.

D. CITATIONS TO OPINIONS BELOW

The opinion below is reported, *In re Englander*, 95 F.3d 1028 (11th Cir. 1996). Appendix, hereinafter "A," pp. 3-12. The bankruptcy court decision is also reported as *In re Englander*, 156 B.R. 862 (Bankr.N.D. Fla. 1992). (A-29-48). The appeal of the bankruptcy judge to the United States District Court, Middle District of Florida, is reproduced in the Appendix, (A-13-28).

E. JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on 19 September 1996. (A-3). A timely filed Petition for Rehearing was denied by the Court of Appeals on 08 November 1996. (A-1). The jurisdiction of

the Supreme Court of United States is invoked pursuant to 28 U.S.C. §1254(1).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional provisions.

Article V of the United States Constitution:

> No person shall...be deprived of...property without due process of law....

Article X of the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States, respectively, or to the people.

2. Statutory provisions.

11 U.S.C. §522 (1990):

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is —
>
> (1) a judicial lien; or
>
> (2) a nonpossessory, nonpurchase-money

security interest in any—

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, off the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.[1]

---

[1] As amended Pub.L. 103-394, Title I, §108(d), Title III, §§303, 304(d), 310, Title V, §501(d)(12), Oct. 22, 1994, 108 Stat. 4112, 4132, 4133, 4137, 4145, 11 U.S.C. §522 provides:

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(A) a judicial lien, other than a judicial lien that secures a debt—

* * *

(3) In a case in which State law that is applicable to the debtor—

G. STATEMENT OF THE CASE

1. The Basis for Jurisdiction Below.

From a core proceeding under 28 U.S.C. §157(b)(2)(B), the United States Court, Middle District of Florida, exercised jurisdiction under 28 U.S.C. §1334. Final action in the district court occurred on 09 June 1994 by virtue

---

> (A) permits a person to voluntarily waive a right to claim exemptions under subjection (d) or prohibits a debtor from claiming exemptions under subsection (d); and
> (B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;

the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds $5,000.

of its order, "Appeal from the United States Bankruptcy Court for the Middle District of Florida, Orlando Division," Case No. 93-59-CIV-ORL-19. (A-13-28). The Notice of Appeal to the Eleventh Circuit was filed on 27 June 1994 (R1-16), and was timely under Rule 4(a), Federal Rules of Appellate Procedure.

Jurisdiction vested in the Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §158(d), as the case was a direct appeal from a final order of the United States District Court, Middle District of Florida, Orlando Division, in its appellate review of the Bankruptcy Court, Middle District of Florida. (A-29-48).

On appeal in the Eleventh Circuit Court of Appeal, the debtor requested the Eleventh Circuit, by "Motion for Certification of Question of Law to the Supreme Court of Florida," to allow the state court of highest resort to address the issue of permissible exemption as a matter of state law as

no Florida state court had considered the precise question presented.[2] The motion was denied. Undisputed issues of fact and law were briefed, considered, and determined, consistent with the lower court order, in favor the trustee.

2. Facts Pertinent to the Questions Presented.

Petitioners, Edward Englander and Phyllis S. Englander, filed a Chapter 7 petition for bankruptcy on 27 September 1990. Mr. and Mrs. Englander claimed their home at 440 Henkel Circle within the city limits of Winter Park, Florida, as exempt property under the Florida homestead exemption. The residence is located on lake front property on a lot measuring 1.05 acres (the "Property"). There is no dispute among the parties that under applicable zoning and building regulations, the Winter Park property

---

[2] "No Florida state court has considered the precise question before us." *In re Englander*, 95 F.3d 1028 (11th Cir. 1996).

cannot be subdivided. The Florida Constitution limits a homestead exemption within a municipality to .5 acres. Article X, §4.[3]

On 30 November 1990, the trustee joined by creditors[4]

---

[3] Constitution of the State of Florida provides for a homestead exemption as follows:

> Homesteads-exemptions
>
> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person: (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family....

[4] Although no specific finding was made by the district

First Union National Bank of Florida and Transamerica Commercial Finance Corporation (collectively Respondents), filed formal objections to various exemptions claimed by Mr. and Mrs. Englander including the homestead exemption. In its First Preliminary Pretrial Order in Objections to Claims of Exemptions Contested Matter (R2-56), the bankruptcy judge bifurcated the objections to the claims of exemptions into two separate issues for purposes of discovery, pretrial, and trial proceedings. The first issue involved the objections to the claim of homestead exemption for the Winter Park property, and the second issue involved all other claims of exemptions and objections. The case under review concerns only the first issue objections to the Englanders' claim of homestead exemption.

---

court or by the Bankruptcy Court, the creditors were admittedly joint creditors. *Cf. In re Persky*, 134 B.R. 81 (Bankr. E.D. N.Y. 1991).

3. Course of the Proceedings.

Two Orders of the United States Bankruptcy Court for the Middle District of Florida, Orlando Division, *In re Englander*, 156 B.R. 862 (Bankr. M.D. Fla. 1992), concerning an objection to Petitioners' claim of homestead exemption in bankruptcy were appealed to the United States District Court. The Debtors appealed from a 08 September 1992, Order Granting Partial Summary Judgment ("Summary Judgment Order")[5] denying Petitioners' claim of homestead

---

[5] Subsequent Orders of the Bankruptcy Court and the parties' briefs in that court referred to the date of the Order Granting Partial Summary Judgment (R5-163) from which Petitioners appealed as 10 September 1992. It appears from the record that the actual date of the Order was 08 September 1992; however, the filing date was 10 September 1992. For consistency purposes, the date of the order was treated as 10 September 1992.

exemption entered by Bankruptcy Court Judge Henry H. Dickinson (A-29-48) and a 04 December 1992, Order on Allocation Issues Related to the Objection to the Claimed Homestead Exemption ("Allocation Order") (R6-214) entered by Bankruptcy Court Judge J. Wendell Roberts.

The Bankruptcy Court disallowed the Englanders' claim of homestead exemption on their residence located in Winter Park, Florida, because the lot size exceeded the permissible State constitutional area limits for a homestead exemption within a municipality. Under the applicable zoning and building regulations, the Winter Park property could not be practically or legally subdivided. Therefore, the Bankruptcy Court ordered a sale of the property and allocation of the proceeds between the debtors and general creditors according to an equitable formula determined by the Bankruptcy Court.

The debtors on appeal to the district court contended

that a forced sale of the homestead property and the substitution of a portion of the sale proceeds in lieu of an actual residence were contrary to the plain language of the Florida Constitution homestead exemption provision and applicable state property law. The issue considered by the district court on appeal was "whether, under the law, the Bankruptcy Court can order a sale of 'would be' homestead property" with an accompanying apportionment of the proceeds when the property exceeds the area limitation permitted under the homestead exemption provision and cannot be practically or legally divided." (R8-261).

In the Eleventh Circuit, the Petitioners first asked the Court of Appeals, by "Motion for Certification of Question of Law to Supreme Court of Florida," to allow the state court system to determine whether general creditors could force the sale of a residential homestead and what protections, if any, did the organic constitutional law afford. In the face of

precedent from the Eleventh Circuit, certifying to the Supreme Court of Florida, questions of the bankruptcy exemption scheme under Florida law, *In re: McCollam*, 986 F.2d 436 (11th Cir. 1993), *question certified*, 955 F.2d 678 (11th Cir. 1992), the Eleventh Circuit denied the motion and elected to address the issue despite the fact "no state court has considered the precise issue...." *In re Englander, supra*, 95 F.3d at 1031.

The Eleventh Circuit noted that one bankruptcy court in Florida had held the debtor entitled to claim a homestead exemption in the entire property, but the majority of Florida bankruptcy courts have held the debtor not entitled to homestead exemption. *In re Englander, supra*, 95 F.3d at 1032. The Eleventh Circuit used Florida joint tenancy law to conclude that general creditors could force the sale of the Florida residence. *Id.*

H. REASONS FOR GRANTING THE WRIT

1. Property rights organic in the constitution of the State are not preempted simply by a citizen filing for bankruptcy protection as federal equity principles are not automatically triggered by filing a petition.

The Bankruptcy Code allows the States to define what property a debtor may exempt from the bankruptcy estate that will be distributed among creditors. The State of Florida has opted out of the federal exemption scheme, *Owen v. Owen*, 500 U.S. 305, 111 S.Ct. 1833, 1836; 114 L.Ed.2d 350 (1990), and permits the debtor to claim exemptions under State law without limitation to amount. 11 U.S.C. §522(f)(3)(B). What the Bankruptcy Court has done is ordered a forced sale, a taking, under the federal bankruptcy code where no such right existed under state law. Under the law of the State of Florida, the constitutional prohibition against forced sale takes priority over the debt or lien in

question. The debt or lien is not invalidated, it is just not enforceable by a forced sale of the homestead. *Miskin v. City of Ft. Lauderdale*, 661 So.2d 415 (Fla. 4th DCA 1995).

The Bankruptcy Court, in effect, established a federal pre-emption scheme to that of the State and imposed federal equity law on the estate. The issue was resolvable by reference to state law, and not some federal rule of equity. *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979).

The United States Constitution, Article I, §8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant, it has been well settled to the extent that state law conflicts with the laws of Congress, enacted under its constitutional authority on the subject of bankruptcy, state law is suspended. But the state law is only suspended to the extent that it conflicts with the system provided by the Bankruptcy

Act of Congress. *Butner v. United States*, *supra*, 440 U.S. at 54, 99 S.Ct. at 918, fn. 9, *citing Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.Ed. 529 (1819).

"Property interests are created and defined by state law." *Butner v. United States, supra*, 440 U.S. at 55, 99 S.Ct. at 918. Unless a federal interest requires a different result, there was no reason why such interests be analyzed differently merely because an interested party is in a bankruptcy proceeding. No case in the State of Florida has allowed general creditors to force the sale of a homestead. The disposition below has violated the principle of uniform treatment of property interests by both the federal courts and the state courts within a State. *See id., citing Lewis v. Manufacturers National Bank*, 364 U.S. 603, 609; 81 S.Ct. 347, 350; 5 L.Ed.2d 323 (1961).

The Eleventh Circuit Court of Appeals noted that "the Florida Constitution does not define the term 'homestead'...."

In re Englander, 95 F.3d at 1031. "No Florida state court has considered the precise issue before us." *Id.* And in considering the residence limitation under the Florida constitutional scheme "one bankruptcy court has held that a debtor was entitled to a homestead exemption in the entire property, the majority of Florida bankruptcy courts have held such debtor were not entitled to the homestead exemption." *Id.*

The only cases in Florida law which have forced a sell of a homestead have been cotenants, usually divorced husband and wife. This line of cases[6] was seized upon by Eleventh Circuit to create a federal equity scenario in violation of this Court's directions in *Butner*. Review should be granted to address the issues of federal pre-emption and federal equity law.

---

[6] *Tullis v. Tullis*, 360 So.2d 375 (Fla. 1978).

2. The State court of highest resort should first be allowed to address the rights of general creditors against a constitutionally protected homestead under the State's exemption scheme rather than a federal court imposing a federal rule of equity.

In *In re Englander*, 95 F.3d 1028 (11th Cir. 1996), the Eleventh Circuit addressed the issue of whether the Bankruptcy Court can order the sale of claimed homestead property, which exceeds the area limitation under the homestead provision.

Florida has opted out of the federal bankruptcy scheme and makes its state statutory scheme available to its residents. The Florida Constitution provides exemption protection to real property which is located within a municipality so long as the property is limited to one-half acre of contiguous land. There are no limitations upon the cost, size or construction of the residence. *Smith v. Guckenheimer*, 42 Fla. 1, 27 So. 900,

911 (1900).

The Eleventh Circuit noted that "No Florida state court has considered the precise issue before us." *In re Englander*, 95 F.3d at 1031. Similarly, the district court in its opinion affirming the Bankruptcy Court's decision to force the sale noted that "the Florida Constitution and case law is silent on whether a forced sale may proceed when the homestead exceeds the permissible area limitation and subdivision is not feasible practically or legally." (A-18-19). The court then decided it "must address whether a forced sale under the instant circumstances with the granting of an exemption in the sale proceeds comports with the policy of Florida homestead exemption and is consistent with existing case law." (A-19). Thus, the federal courts have considered what is a question of first impression under Florida constitutional law (A-8); a question that must necessarily interpret the Florida Constitution.

On 04 October 1994, the Petitioners moved the Eleventh Circuit to remand the case to the Supreme Court of Florida and briefed the issue. It was, and remains, the position of the Petitioners that the issue of constitutional homestead exemption should first be decided by the state court system, and most appropriately, the Supreme Court of Florida.

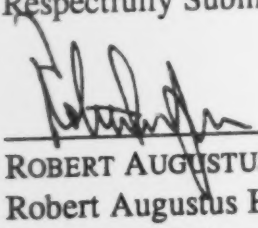
It is the position of the Petitioners that review should be granted for the Court to determine whether, in cases of first impression of a state constitutional exemption, the federal bankruptcy courts should defer analysis and interpretation to the highest court in the State. This Court has previously held that "property" and "interest in property" are creatures of state law, *Barnhill v. Johnson*, 503 U.S. 393, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992), and "[u]nless some federal interest requires a different result, there is no reason why such [property] interests should be analyzed differently simply

because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 481, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). The Court is requested to grant certiorari in this case and address whether the Courts of Appeal should defer such fundamental questions of a citizen's constitutional property rights to the States, particularly the state court of last resort.

I. CONCLUSION

The petition for writ of certiorari should be granted, and the case briefed on the merits; that relief is hereby requested.

Respectfully Submitted,



ROBERT AUGUSTUS HARPER
Robert Augustus Harper
Law Firm, P.A.
325 West Park Avenue
Post Office Box 10132
Tallahassee, Florida 32302-2132
(904) 224-5900
fax (904) 224-9800
FL Bar No. 127600
GA Bar No. 328360

COUNSEL FOR PETITIONER

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TABLE OF CONTENTS

Document(s)	Page
United States Court of Appeals for the Eleventh Circuit, order Denying Rehearing Filed 08 November 1996	A-1
United States Court of Appeals for the Eleventh Circuit, Opinion Filed 19 September 1996	A-3
United States District Court, Middle District of Florida, Orlando Division, Appeal From the United States Bankruptcy Court for the Middle District of Florida, Orlando Division dated 09 June 1994	A-13
United States Bankruptcy Court, Middle District of Florida, Orlando Division, Order Granting Partial Summary Judgment dated 10 September 1992	A-29

Filed
U.S. Court of Appeals
Nov. 8, 1996
Miguel J. Cortez
Clerk

IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2823

IN RE: EDWARD ENGLANDER and PHYLLIS S. ENGLANDER,
Debtors.

EDWARD ENGLANDER; PHYLLIS S. ENGLANDER,
Plaintiffs-Appellants,

versus

GEORGE E. MILLS; FIRST UNION NATIONAL BANK OF FLORIDA; TRANSAMERICA COMMERCIAL FINANCE CORPORATION,
Defendants-Appellees,

CHARLES W. BROUN,
Trustee.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: TJOFLAT and COX, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants EDWARD ENGLANDER and PHYLLIS S. ENGLANDER is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

In re Edward ENGLANDER and Phyllis S. Englander, Debtors.

Edward ENGLANDER; Phyllis S. Englander, Plaintiffs-Appellants,

v.

George E. MILLS; First Union National Bank of Florida; Transamerica Commercial Finance Corporation, Defendants-Appellees,

Charles W. Broun, Trustee.

No. 94-2823.

United States Court of Appeals,
Eleventh Circuit.

Sept. 19, 1996.

***1029** Robert Augustus Harper, Tallahassee, FL, for Appellants.

David E. Peterson, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, FL, for First Union National Bank.

Samuel J. Zusmann, Jr., Maguire, Voorhis & Wells, P.A., Orlando, FL, for Transamerica Commercial.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and CLARK, Senior Circuit Judge.

PER CURIAM:

In this bankruptcy appeal, appellants Edward and Phyllis S. Englander ("Debtors") contest the district court's affirmance of the bankruptcy court's denial of their claim of homestead exemption and order of a sale of the property and allocation of the proceeds so that the Bankruptcy Estate could realize the value of its interest in the non-exempt portion of the property.

FACTS

On September 27, 1990, Edward and Phyllis S. Englander ("Debtors") filed a joint petition under Chapter 7 of the Bankruptcy Code. The Debtors claimed their entire residence and lot at 440 Henkel Circle, Winter Park, Florida as their homestead exemption. The property lies within the city limits of Winter Park, Florida, and is located on a lake front lot which exceeds one-half acre. The parties agree that the property cannot be subdivided due to local zoning and building regulations.

The creditors and trustee objected to the claim of exemption for this property because the acreage exceeded the allowable amount under Florida law. [FN1] The Debtors admitted that the property was 1.05 acres and attempted to clarify the size of the claimed exempt and non-exempt property. A landowner ***1030** can designate a portion of their property as their homestead, subjecting only the remainder to sale. Fla.Stat.Ann. § 222.02 (1989). The Debtors' designated portion of non-exempt property had no access to roads, utilities or lake frontage and was completely surrounded by

the claimed exempted .5 acres of land. The bankruptcy court granted the creditors' and trustee's motion for summary judgment, noting that the Debtors' "attempt at homestead exemption 'gerrymandering' was clearly made in bad faith." [FN2] In lieu of granting the exemption, the bankruptcy court gave the Debtors an exemption in a portion of the proceeds to be derived from the sale of the property. The parties subsequently filed a stipulation and briefs on the issue of allocation, and the Debtors again attempted to amend the description of their claimed exempt property. The bankruptcy court denied the Debtors' amendment to their homestead exemption, and ordered the property sold and the proceeds allocated. [FN3]

> FN1. Although the creditors and trustees also objected to other claimed exemptions and to this claim on other grounds, only the acreage limitation is considered by this appeal.
>
> FN2. R1-1, Exhibit 2-20; In re Englander, 156 B.R. 862, 864 (Bankr.M.D.Fla.1992).
>
> FN3. R1-1, Exhibit 3-26.

The district court affirmed the decision of the bankruptcy court relating to the claim of homestead exemption. [FN4]

> FN4. R1-14 at 19. The district court also affirmed in part and vacated in part the bankruptcy court's order as to the allocation of the proceeds of the sale, and remanded for further proceedings. However, those rulings were not appealed.

JURISDICTION AND STANDARDS OF REVIEW

This Court has jurisdiction to review the district court's order under 28 U.S.C. § 158(d). In reviewing a bankruptcy court judgment as an appellate court, the district court reviews the bankruptcy court's legal conclusions de novo. [FN5] The district court must accept the bankruptcy court's factual findings unless they are clearly erroneous, and give due regard to the bankruptcy court's opportunity to judge the credibility of the witnesses. [FN6] This Court reviews factual findings for clear error, and the district court's determinations of law de novo. [FN7] Neither the district court nor this court may make independent factual findings. [FN8]

FN5. In re JLJ Inc., 988 F.2d 1112, 1116 (11th Cir.1993), citing In re Goerg, 930 F.2d 1563, 1566 (11th Cir.1991); Bankruptcy Rule 8013, 11 U.S.C. (1988).

FN6. Id.; Bankruptcy Rule 8013, 11 U.S.C. (1988).

FN7. In re Sublett, 895 F.2d 1381, 1383 (11th Cir.1990).

FN8. In re JLJ, Inc., 988 F.2d at 1116.

DISCUSSION

The issue on appeal is whether the bankruptcy court can order the sale of a claimed homestead property, which exceeds the area limitation under the homestead provision and cannot be practically or legally subdivided, and then order an apportionment of the proceeds.

A bankruptcy estate consists of all property that the debtor

owned at the time of the filing of the bankruptcy petition. [FN9] Although the Bankruptcy Codes provides for exemption of property which would otherwise be subject to the administration of the bankruptcy estate, Florida has opted out of the federal exemption scheme and makes its state statutory scheme available to its residents. [FN10]

FN9. 11 U.S.C. § 541.

FN10. 11 U.S.C. § 522(b); Fla.Stat. § 222.20.

The Florida law provides for a homestead exemption as follows:

> Homesteads--exemptions
> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be ***1031** reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.... [FN11]

FN11. Fla. Const. art. X, § 4(a)(1).

Although the Florida Constitution does not define the term "homestead," it does provide various limitations and requirements which include an acreage limitation, an ownership requirement, and a residency limitation. The issue in this case involves the acreage limitation.

The Florida Constitution provides exemption protection to real property which is located within a municipality only so long as the property is limited to one-half acre of contiguous land. There are no limitations upon the cost, size, or construction of the residence. [FN12]

> FN12. Smith v. Guckenheimer, 42 Fla. 1, 37, 27 So. 900, 911 (1900).

In order to be exempt the property must meet all of the requirements of the constitution for exemption. [FN13] It must not exceed the half of one acre in an incorporated town. [FN14] Florida courts have denied the exemption to property that exceeds the allowed limitations of residency by dividing the property, and allowing the non-exempt property to be sold for payment of the owner's debts. [FN15] Because the only exceptions to homestead exemption are those specifically enumerated in the Florida Constitution, courts have refused to create new ones. [FN16] The Florida homestead exemption laws do not contemplate the cutting up and division of an entire indivisible building situated on exempt real estate. [FN17] No Florida state court has considered the precise issue before us.

> FN13. Smith, 42 Fla. at 17, 27 So. at 915.

> FN14. See Id., 42 Fla. at 17, 27 So. at 915.

FN15. Id., 42 Fla. at 19, 27 So. at 916.

FN16. In re Baxt, 188 B.R. 322, 324 (Bankr.S.D.Fla.1995); Bank Leumi Trust Co. of N.Y. v. Lang, 898 F.Supp. 883, 887 (S.D.Fla.1995); Butterworth v. Caggiano, 605 So.2d 56, 60 (Fla.1992); Smith, 42 Fla. at 36-40, 27 So. at 911-912.

FN17. Smith v. Guckenheimer, 42 Fla. 1, 53, 27 So. 900, 905 (Fla.1900).

Florida case law dictates that the homestead exemption laws be liberally applied to the end that the family shall have shelter and shall not be reduced to absolute destitution. [FN18] However, the homestead exemption law is intended to be a shield, not a sword, and should not be applied as to make it an instrument of fraud or as an imposition upon creditors. [FN19] The Florida Supreme Court in a case where the land was owned by tenants in common following a divorce stated that, although the purpose of the homestead exemption is to protect the family home from forced sale for the debts of the owner and head of the family, it had "never held that the homestead provision precludes a common owner of property from suing for partition and obtaining a forced sale in order to obtain the beneficial enjoyment of her interest in the property." [FN20] Further, "(h)omestead interests should be protected from forced sale whenever possible, but not at the expense of others owning interests in the property." [FN21]

FN18. Orange Brevard Plumbing & Heating Company v. La Croix, 137 So.2d 201, 203 (Fla.1962); Smith, 42 Fla. at 41, 27 So. at 912.

FN19. Palm Beach Savings & Loan Association, F.S.A. v. Fishbein, 619 So.2d 267 (Fla.1993); Orange Brevard Plumbing & Heating Company, 137 So.2d at 203; Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 891, 13 So.2d 448, 450 (1943).

FN20. Tullis v. Tullis, 360 So.2d 375, 377 (Fla.1978).

FN21. Id., 360 So.2d at 378.

In considering the residence limitation, although one Florida bankruptcy court has held that a debtor was entitled to a homestead exemption in the entire property, the majority of Florida bankruptcy courts have held such debtors were not entitled to the homestead exemption. In finding the debtor entitled to the homestead exemption, the court noted that the debtor used only one side of a duplex as a residence and used the other side as rental property, but utilized a ***1032** new divisibility test which considered whether the property was divisible and lawfully conveyable. [FN22] The court found that the debtor was entitled to the exemption because, although the property was divisible, portions were not salable under the existing zoning laws. [FN23] Other Florida bankruptcy courts have denied exemptions to debtors where the debtors used a building on the property in which they claimed homestead exemption as both their residence and as rental property, reasoning that "the mere fact that the claimant occupies part of the property as a residence is not enough to entitle him to an exemption in the whole." [FN24]

FN22. In re Kuver, 70 B.R. 190, 192-193 (Bank.S.D.Fla.1986); In re Makarewicz, 126 B.R. 127, 128 (Bank.S.D.Fla.1991).

FN23. In re Kuver, 70 B.R. at 192.

FN24. In re Aliotta, 68 B.R. 281, 282 (Bankr.M.D.Fla.1986); In re Rodriguez, 55 B.R. 519 (Bankr.S.D.Fla.1985).

The majority of Florida bankruptcy courts that have denied a homestead in the entire property have ruled that where the property is not divisible, the trustee could sell the property and the court would apportion the proceeds. [FN25] In In re Baxt, the court held that because the Florida homestead exemption is for "one-half acre," not "one-half acre if you live in Parkland (where the property is not divisible)," allowance of a homestead exemption on a 2.5 acre in a municipality would be a contravention of the divisibility test. [FN26] Florida courts have extended the homestead exception to include the proceeds of a voluntary sale when it is intended in good faith that such proceeds are to be reinvested in a new homestead and only as to the amount of the proceeds which are intended to be reinvested in another homestead. [FN27]

FN25. In re Wierschem, 152 B.R. 345, 347 (Bankr.M.D.Fla.1993) (holding that rural property that exceeded the residency limitation was subject to the same administration as In re Englander, 156 B.R. 862 (Bankr.M.D.Fla.1992)); In re Baxt, 188 B.R. 322, 323-324 (Bankr.S.D.Fla.1995) (finding appropriate the sale of an urban indivisible 2.5 acre lot, and apportionment of the proceeds).

FN26. 188 B.R. at 323-324.

FN27. Orange Brevard Plumbing & Heating Company, 137 So.2d at 206.

Bankruptcy courts in other states have similarly ordered the sale and apportionment of proceeds. In In re Evans, the Vermont bankruptcy court found the sale and apportionment of the proceeds "an equitable solution of the existing problem" to a homestead exemption claim where the property exceeded the state's $30,000 limitation on a homestead. [FN28] The Eighth Circuit affirmed a bankruptcy court's order of the sale of a property and apportionment of the proceeds in a situation where the property exceeded the state homestead limitation on area, finding that the apportionment allowed an appropriate recognition of the debtor's homestead exemption and yet afforded the creditors some satisfaction of their rightful claims. [FN29]

FN28. 51 B.R. 47, 50 (Bankr.D.Vt.1985).

FN29. O'Brien v. Heggen, 705 F.2d 1001, 1004 (8th Cir.1983).

CONCLUSION

Here, the debtors' claimed homestead property exceeds the limitation on area set by the Florida constitution and is indivisible. A sale and apportionment of the proceeds is an equitable solution, allows for an appropriate recognition of the debtors' homestead exemption, and will afford the creditors some satisfaction of their rightful claims. Therefore, the judgment of the district court is AFFIRMED.

In re: EDWARD ENGLANDER and PHYLLIS S. ENGLANDER,

Appellants,

v.

GEORGE C. MILLS, JR., TRUSTEE, FIRST UNION NATIONAL BANK OF FLORIDA, and TRANSAMERICA COMMERCIAL FINANCE CORPORATION,

Appellees.

No. 93-59-CIV-ORL-19

United States District Court
Middle District of Florida
Orlando Division

June 9, 1994

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

This is an appeal from two Orders of the United States Bankruptcy Court for the Middle District of Florida, Orlando Division, concerning an objection to Appellants' claim of homestead exemption in Bankruptcy Case No. 90-03798-6C7. Debtors/Appellants appeal from a September 8, 1992 Order Granting Partial Summary Judgment ("Summary Judgment

Order")[1] denying Appellants' claim of homestead exemption entered by the Honorable Henry H. Dickinson and a December 4, 1992 Order on Allocation Issues Related to the Objection to the Claimed Homestead Exemption ("Allocation Order")[2] entered by the Honorable J. Wendell Roberts. The Bankruptcy Court disallowed Appellants' claim of homestead exemption on property located in Winter Park, Florida because the property exceeded the permissible area limits for a homestead exemption within a municipality. Under the applicable zoning and building regulations, the Winter Park property could not be subdivided. Therefore, the Bankruptcy Court ordered a sale of the property and allocation of the proceeds according to a formula determined by the Bankruptcy Court so that the Bankruptcy Estate could realize the value of its interest in the non-exempt portion of the property.

Appellants contend that a forced sale of the homestead property and the substitution of a portion of the sale proceeds in lieu of the real property is contrary to the plain language of the Florida Constitution homestead exemption provision.

The issue on appeal is whether, under the law, the Bankruptcy Court can order a sale of "would be" homestead

---

[1] Subsequent Orders of the Bankruptcy Court and the parties' briefs refer to the date of the Order Granting Partial Summary Judgment (Exhibit 20, Bankruptcy Record Docket Entry 163) from which Appellants appeal as September 10, 1992. It appears from the record that the actual date of the Order was September 8, 1992; however, the filing date was September 10, 1992. For consistency purposes, this Court will refer to the date of the Order as September 10, 1992.

[2] This Order is found in the record on appeal at Exhibit 26 and in the Bankruptcy Record at Docket Entry 214.

property with an accompanying apportionment of the proceeds when the property exceeds the area limitation permitted under the homestead exemption provision and cannot be practically or legally divided. If the Bankruptcy Court's Order directing a sale of Appellants' property is affirmed, Appellants appeal from the Allocation Order contesting the following issues: (1) the right of Appellants to retain the property by paying to the Estate an amount nominally greater than the Estate would receive on a net basis from a sale to a third party, without the limitations imposed by the Bankruptcy Court; (2) the appropriate date for determining the value of the subject property for purposes of allocating proceeds; (3) the allocation of the costs of the sale of the subject property; and (4) the payment and calculation of interest to be paid by Appellants to the Estate on the Estate's share of the property or proceeds.

STATEMENT OF FACTS

Appellants, Edward Englander and Phyllis S. Englander, filed a Chapter 7 petition on September 27, 1990. Appellants claimed their residence at 440 Henkel Circle in Winter Park, Florida as exempt property under the homestead exemption. Appellants' residence is located on lake front property on a tract of land measuring 1.05 acres (the "Property"). There is no dispute among the parties that under applicable zoning and building regulations, Appellants' Winter Park Property cannot be subdivided. The Florida Constitution limits a homestead exemption within a municipality to .5 acres.

On November 30, 1990, the Trustee joined by creditors First Union National Bank of Florida and Transamerica Commercial Finance Corporation (collectively "Objectors/Appellees"), filed their formal objections to various exemptions claimed by Appellants including the homestead exemption. In its First Preliminary Pretrial Order in

objections to Claims of Exemptions Contested Matter (Exhibit 6, Bankruptcy Record Docket Entry 56), the Bankruptcy Court bifurcated the objections to Appellants' claims of exemptions in two separate tracks for purposes of discovery, pretrial, and trial proceedings. The first track involved the objections to Appellants' claim of homestead for their Winter Park Property, and the second track involved all other claims of exemptions and objections. The appeal concerns only the first track objections to Appellants' claim of homestead exemption.

Appellants admitted that they initially misstated the actual size of the Property for which they claim a homestead exemption on their schedule of exempt property. After two amendments to the schedule B-4, Appellants clarified the legal description of the property they claimed as homestead exemption within the tract of land containing their residence. Attached to the Bankruptcy Court's Summary Judgment Order at Exhibit A is the configuration of the .5 acres in which Appellants claim an exemption and the .55 acres non-exempt portion of the Winter Park Property. The designated portion of non-exempt property has no access to roads, utilities or lake frontage and is completed surrounded by the .5 acres of land in which Appellants claim an exemption. In the Bankruptcy Court's Summary Judgment Order, the Court described the manner in which Appellants configured the exempt and nonexempt portions of the Property as 'homestead exemption "gerrymandering"...clearly made in bad faith.'[3]

---

[3] Appellants object to the Bankruptcy Court's finding that their designation of exempt and non-exempt property was done in bad faith. A review of the record on appeal reflects that the finding of "bad faith" was not germane to the Bankruptcy Court's ruling and is not an issue this Court needs to address on appeal.

The Bankruptcy Court considered the objections to Appellants' claim of homestead exemption on cross-motions for summary judgment. On September 10, 1992, the Bankruptcy Court entered its Order Granting Partial Summary Judgment holding that the entire Winter Park Property could be sold and reserving ruling on the appropriate allocation of the proceeds from such sale to Appellants and the Bankruptcy Estate.

Pursuant to the Bankruptcy Court's Order, the parties filed a pretrial stipulation and briefs on the allocation and other issues related to a prospective sale of the Property. On November 19, 1992, Appellants filed their Notice of Third Amendment to Schedule B-4 Correcting Legal Description of Real Property Claimed Exempt as Homestead. After hearing oral argument on the allocation and other issues related to a sale of the Property, the Bankruptcy Court entered its Order on Allocation Issues Related to the Objection to the Claimed Homestead Exemption on December 4. 1992.

The Bankruptcy Court denied Appellants' third amendment to their schedule of homestead exemption and ordered that (1) the allocation of the proceeds and the method of the sale of the Property shall be as described in the Order; (2) the petition date is the determinative date for valuing the Property; (3) Appellants are responsible for property taxes and the Estate is liable to Appellants for its allocable share of the post-petition date taxes; (4) Appellants are liable to the Estate for interest on the Estate's portion of the sale proceeds from the petition date at the rate specified in 28 U.S.C. § 1961 in effect on the applicable dates; and (5) an appraisal of the Property could be obtained at the time of the Bankruptcy Court's Order.

Together, the Summary Judgment Order and the Allocation Order at Exhibits 20 and 26 (Bankruptcy Record Docket Entries 163 and 214) constitute the final order of the

Bankruptcy Court on the homestead exemption issues from which Appellants appeal. On May 3, 1993 at Docket Entry 9, this Court denied Appellants' Motion to Stay Pending Appeal of Order Directing Appraisals, holding that an appraisal of the Property could be obtained prior to the exhaustion of all appeals.

CONCLUSION OF LAW

"In a bankruptcy appeal, a district court will subject the bankruptcy court's determinations of law to *de novo* review." *In re Goerg*, 930 F.2d 1563, 1566 (11th Cir. 1991) (citing *In re Sublett*, 895 F.2d 1381, 1383 (11th Cir. 1990)).

I. HOMESTEAD EXEMPTION

Section 541 of the Bankruptcy Code creates an estate that consists of all property of the debtor at the time of the filing of the bankruptcy petition. 11 U.S.C. §541. The exemption of property which would otherwise be subject to the administration of the estate is governed by 11 U.S.C. §522. Florida has opted out of the federal exemption scheme and instead makes available to its residents a state statutory exemption scheme. 11 U.S.C. §522(b); Fla. Stat. §222.20.

The Florida Constitution protects a homestead from forced sale and states in relevant part:

> There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon,...if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner of his family.

Fla. Const. art. X, §4 (West 1994). The Florida Constitution

and case law is silent on whether a forced sale may proceed when the homestead exceeds the permissible area limitation and subdivision is not feasible practically or legally.

In lieu of granting Appellants' homestead exemption, the Bankruptcy Court gave Appellants an exemption in a portion of the proceeds to be derived from the sale of the Property. Appellees contend that since the Bankruptcy Court denied Appellants' homestead claim, the sale of the Property will not violate the Florida Constitution or any Florida exemption statute. Appellees' argument is based on semantics and is not helpful in determining whether a forced sale of the subject Property violates the Florida Constitution and exemption statutes.

In contrast, Appellants argue that a forced sale of Property violates the plain meaning of the Florida Constitution. However, Article X, §4(a)(1) expressly states that the homestead exemption within a municipality is limited to one-half acre of contiguous land. Thus, to allow Appellants to claim the total 1.05 acres as homestead exemption is as violative of the plain language of the Florida Constitution as forcing a sale of Appellants' homestead.

Instead, this Court must address whether a forced sale under the instant circumstances with the granting of an exemption in the sale proceeds comports with the policy of the Florida homestead exemption and is consistent with existing case law.

"Florida has a public policy of protecting the homestead exemption, and homestead statutes have enjoyed particularly liberal construction." *In re Meola*, 158 B.R. 881, 882 (Bankr. S.D. Fla. 1993); *In re McAtee*, 154 B.R. 346, 347 (Bankr. N.D. Fla. 1993). The policy considerations promoted through the homestead exemption include "the stability and welfare of the state by encouraging property ownership," *In re McAtee*, 154 B.R. at 347, and securing a

family's home during a time of economic misfortune so the family does not become dependent upon the state. *Id.*; *see also In re Meola*, 158 B.R. at 882. While homestead statutes are to be liberally construed, the Florida courts have repeatedly held that "organic and statutory homestead exemptions...should not be applied so as to make them an instrument of fraud or imposition upon creditors." *Palm Beach Savings & Loan Ass'n v. Fishbein*, 619 So.2d 267, 269 (Fla. 1993) (quoting *Jones v. Carpenter*, 106 So. 127, 130 (Fla. 1925).

In balancing the policies of protecting the homesteader during times of economic misfortune and the rights of creditors, the Florida courts have applied equitable principles to the homestead exemption. *See Hillsborough Inv. Co. v. Wilcox*, 13 So.2d 448, 450 (Fla. 1943) ("Equity has complete jurisdiction over homesteads and exemptions."); *In re Wierschem*, 152 B.R. 345, 349 (Bankr. M.D. Fla. 1993) ("the homestead exemption is subject to equitable considerations"), *but see Palm Beach Savings & Loan Ass'n v. Fishbein*, 619 So.2d at 272 (Shaw, J., dissenting) ("[t]he homestead protection has never been based upon principles of equity"). While there are no cases factually on point, the Florida cases applying equitable principles to the homestead exemption support the Bankruptcy Court's Order directing a sale of Appellants' Property and providing Appellants an exemption in a portion of the sale proceeds.

The Supreme Court of Florida upheld the imposition of an equitable lien imposed on a homestead although such liens do not fall within the literal language of the Florida Constitution which excepted from homestead protection against creditors only the payment of taxes and assessments, obligations contracted for the purchase, improvement or repair of the homestead, or for labor performed on the realty. *Palm Beach Savings & Loan Ass'n v. Fishbein*, 619 So.2d at 269-71

(citing Fla. Const. art. X, §4). While factually dissimilar from the instant appeal, the *Fishbein* case instructs that "where equity demands," Florida courts may go beyond the literal language of Article X, section 4 and impose equitable liens on homesteads. *Id.* at 270. "The homestead exemption is intended to be a shield, not a sword" and does not entitle the homesteader to a windfall. *Id.* at 271.

Florida courts have approved the forced sale of homesteads to protect the interests of others in the property. *Tullis v. Tullis*, 360 So.2d 375, 377 (Fla. 1978); *Westcott v. Westcott*, 487 So.2d 1099, 1101 (Fla. 5th DCA), *review denied* 494 So.2d 1154 (Fla. 1986). After a dissolution of marriage, the *Tullis* and *Westcott* courts held that when one of the former spouses claimed the marital residence as his or her homestead, partition was the only way for the other former spouse to enjoy his or her one half undivided interest in the property. "Homestead interests should be protected from forced sale wherever possible, but not at the expense of others owning interests in the property." *Tullis v. Tullis*, 360 So.2d at 377.

Appellants argue that cases involving a forced sale of the homestead of a formerly married couple are inapplicable to this case. Although *Westcott* and *Tullis* concern the disposition of a divorced couple's undivided interest in the homestead after a dissolution of marriage, the basic principle of those cases applies to the instant appeal. By application of §541 of the Bankruptcy Code, Appellants' Property becomes property of the Bankruptcy Estate. Since only a portion of Appellants' Property would be protected from creditors under the homestead exemption, the other portion of Appellants' Property is subject to the administration of the Estate. Like the former marital residences in *Tullis* and *Westcott*, partition of Appellants' Property is not feasible practically or legally. Therefore, a forced sale is the only method to protect the

interests of the Estate.

In *O'Brien v. Heggen*, 705 F.2d 1001 (8th Cir. 1983), the Eight Circuit affirmed the bankruptcy court's order apportioning to the debtor and his creditor the sale proceeds of the debtor's residence which exceeded the homestead exemption statute area limitations by .27 acres. Appellants contend that the *O'Brien* case is inapposite to this appeal for reasons including, but not limited to the followings: (1) the Minnesota homestead provision is statutory rather than constitutional and (2) the debtor did not object to the sale of the property at issue.

Although there are differences in the Minnesota and Florida homestead exemption provisions, both states limit the exemption by area. The *O'Brien* case presents facts similar to the instant appeal in that the debtor's homestead exceeded the statutory area limitation and subdivision of the debtor's homestead property was not feasible practically or legally. The solution in *O'Brien* of apportioning the sale proceeds as exempt and non-exempt "allows an appropriate recognition of debtor's homestead exemption and yet affords creditors some satisfaction of their rightful claims." *Id.* at 1004.

This Court finds that the Bankruptcy Court's Order directing a sale of Appellants' Property and apportioning the proceeds as exempt and non-exempt provides the same type of balanced solution as that in the *O'Brien* case. Such a solution affords Appellants the benefits of the homestead exemption and yet affords the Estate its rightful interest in the .55 acres of non-exempt property. Further, the principle of *Palm Beach Savings & Loan Ass'n v. Fishbein*, 619 So.2d at 270 (where equity demands, courts may go beyond the literal language of Article X, section 4 to impose equitable liens on homesteads), supports the Bankruptcy Court's Order which goes beyond the literal language of Article X, section 4 to impose an equitable solution to Appellants' claim of homestead exemption and

Appellees' objections. Allowing Appellants an exemption in their portion of the proceeds from the sale of the Property will allow Appellants to purchase another homestead.[4] Thus, this solution preserves the important public policy consideration of proving a family with a residence during times of economic misfortune.

This Court affirms the Order Granting Partial Summary Judgment of the Bankruptcy Court finding that a sale of the Property with an apportionment of the proceeds as exempt and non-exempt is not contrary to law and is consistent with the policies of Florida's constitutional homestead exemption provision.

II. ALLOCATION ISSUES

This Court will address the issues relating to allocation of the proceeds from the sale of the Property as framed by Appellants.

1. Upon a sale of the Property, may the Appellants retain the Property by applying to the Estate a sum of money nominally greater than the estate would receive on a net basis from a sale to a third party, without the limitations imposed by the Bankruptcy Court?

Appellants contend that the Bankruptcy Court's Allocation Order requires Appellants to pay at least ten percent more than the net amount the Estate would receive

---

[4] The Bankruptcy Court noted that Appellants listed the value of their home in May 1988, at $900,000.00, and in September 1990, Appellants valued their home at $700,000.00. while these numbers do not reflect the amount for which the Property could be sold in today's market, these numbers are an indication that after a sale and an apportionment of the proceeds, Appellants will have ample funds preserved to purchase a suitable residence.

from any other bidder to retain the Property. Appellants' reference to a required purchase price of ten percent in excess of another bid is only if Appellants make an offer to purchase the property pursuant to ¶ 1, page 6 of the Allocation Order, and they fail to close that initial offer. Paragraph 2, page 6 of the Allocation Order requires "a sum at least ten percent in excess of that which the Estate would receive under an accepted offer to purchase" only if Appellants make a second offer subsequent to a failure to close on their first offer.

Because the Allocation Order does not require Appellants to pay a sum ten percent greater than any other bid to retain the Property upon an initial offer, the Court finds that this objection of Appellants to the Allocation Order is without merit.

2. Is the petition date or the date the Bankruptcy Court entered its Summary Judgment Order the appropriate date for determining the value of the Property for purposes of allocating proceeds?

Appellants provide no authority for the proposition that the date of the Summary Judgment Order of September 10, 1992, rather than the petition date of September 27, 1990, should be the date for determining the value of the Property. Entitlement to an exemption is determined as of the petition date, and the value of an exemption should be determined as of that date. *In re Girard*, 98 B.R. 685, 688 (Bankr. D. Vt. 1989).

This Court agrees with the Bankruptcy Court's determination that the date to be used for determining the value of the Property for purposes of allocation is September 27, 1990, the date Appellants filed their petition for bankruptcy.

3. Which party should bear the costs of a prospective sale of the Property?

The bankruptcy record reflects that there are no

outstanding mortgages or liens on Appellants' Property, and an appraisal will be obtained at the Estate's expense. However, the Allocation Order is silent on the amount and character of other expenses that could accrue through a sale of the Property, and no ceiling on such expenses has been proposed. If the costs associated with a sale vitiate the amount of process remaining to Appellants for the acquisition of another homestead, the spirit of the Bankruptcy Court's Order to preserve the policy of the homestead exemption is lost.

In *In re Wierschem*, 152 B.R. 345 (Bankr. M.D. Fla. 1993), the bankruptcy court denied the debtors' claim of homestead exemption and ordered that the property be sold because the property exceeded the residency limitation imposed by the Florida Constitution. *Id.* at 347 ("The Florida Constitution provides exemption protection to a piece of real property only so long as the property is the residence of the owner or the owner's family."). While not exceeding the area limitation for homestead property outside a municipality, two separate structures containing a total of five separate living units were located on the debtors' property. The property was primarily rental real estate. The debtors lived in one of the five units and rented the other four units. The applicable zoning regulations did not permit partition of the property.

The *Wierschem* court "permit[ted] the trustee to sell the entire real property and divide the proceeds, *after* satisfying mortgage and other liens of record and paying the ordinary and necessary costs and expenses of sale and closing, between the estate and debtors" according to a specified allocation formula. *Id.* at 349 (emphasis added). In the case of an existing mortgage on the property to be sold, equity demands that the *net* proceeds, rather than the *gross* proceeds, be allocated to avoid a windfall to the debtor. However, in the instant appeal, Appellants own their homestead free and clear

of any mortgages or liens. If the portion of proceeds available to Appellants for acquiring another homestead is reduced by the unidentified expenses of a forced sale, Appellants may be deprived of the protection provided by the Florida Constitution.

Appellants cite §522(k) of the Bankruptcy Code ("[p]roperty that the debtor exempts under this section is not liable for payment of any administrative expense"), to support their contention that the Trustee should pay the expenses of a sale of the Property. Technically, section 522(k) does not apply, because Appellants' homestead exemption has been denied, and Appellants are entitled to an exemption in a portion of the proceeds only.

In its Summary Judgment Order, the Bankruptcy Court states that the Trustee's interest in Appellants' residence is similar to that of a co-owner given that the Property cannot be partitioned and the Trustee has an ownership interest in the non-exemption portion (Exhibit 20, Bankruptcy Record Docket Entry 163, p. 19). Therefore, the Bankruptcy Court held that the costs associated with the sale of the Property shall be allocated between Appellants and the Estate in the same ratio as the sale proceeds. *See* 11 U.S.C. §363(j)(providing for the distribution of proceeds, costs and expenses after a sale of property according to the interests of co-owners).

This Court is concerned about affirming in the abstract a black letter rule of law which states that a trustee and a debtor become co-owners of homestead property when the constitutional area limitation is exceeded. Considering that the facts of this appeal have presented a novel question of law as to the interpretation of a constitutional provision and equitable principles have been applied to the issue, the Court cannot make a finding on the basis of the record presently before it whether the Bankruptcy Court's ruling on the

allocation of the costs of a sale of the Property is or is not contrary to law. At this point in this appeal, the allocation of undetermined costs from a prospective sale of the Property presents a hypothetical situation.

This Court, sitting as a reviewing court, should not decide questions of law on a hypothetical set of facts. "If the bankruptcy court's factual findings are ambiguous or silent as to an outcome-determinative factual question, the district court must remand the case to the bankruptcy court." *In re Goerg*, 930 F.2d at 1566.

The expenses of a sale of the Property should not significantly diminish Appellants' portion of the proceeds, thus preventing the acquisition of another homestead. Application to the Bankruptcy Court should be made for consideration of the issue of the allocation of the *actual* costs from a sale of the Property. This Court declines to affirm the Bankruptcy Court's ruling on allocation of costs of the sale when the amount and type of costs are undetermined.

4. Should Appellants pay to the Estate the interest on the value of the Estate's portion of the sale proceeds from the date of petition, and if so, how should such interest be calculated?

This Court affirms the Bankruptcy Court's ruling that Appellants are liable to the Estate for interest on the Estate's portion of the sale proceeds from petition date at the rate specified in 28 U.S.C. §1961 in effect on the applicable dates. Appellants have benefited from the sole use and enjoyment of the Property since filing for bankruptcy on September 27, 1990 despite the fact that over half of the Property, .55 acres, is property of the Estate and has been since the petition date.

CONCLUSION

The Court finds that the Bankruptcy Court's Order directing

a sale of the Property with an apportionment of the proceeds, as exempt and non-exempt, to Appellants and the Estate is not contrary to law. The rulings contained in the Bankruptcy Court's Allocation Order related to Appellants' liability to the Estate for interest on the Estate's portion of the sale proceeds from the petition date and the calculation thereof, and the use of the petition date as the determinative date for valuing the Property are not contrary to law. This Court cannot determine whether the ruling contained in the Bankruptcy Court's Allocation Order related to the allocation of expenses from the sale of the Property, except for the costs of an appraisal, is proper absent specification of what costs are involved. This issue is remanded to the Bankruptcy Court for further development in the record.

Accordingly, the decision of the Bankruptcy Court relating to Appellants' claim of homestead exemption as contained in the Order Granting Partial Summary Judgment is **AFFIRMED.** The allocation issues as contained in the Order on Allocation Issues Related to the Objection to the Claimed Homestead Exemption are **AFFIRMED IN PART** as stated above. However, the portion of the Order which references unidentified costs of sale is **VACATED**, and the case is **REMANDED** For further proceedings to specify what costs are involved.

DONE AND ORDERED at Orlando, Florida this 9th day of June, 1994.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
United States District Judge

Copies to:
All Counsel of Record

In re Edward W. ENGLANDER et ux., Debtors.

Bankruptcy No. 90-03798-BXC-6C7.

United States Bankruptcy Court,
M.D. Florida,
Orlando Division.

Sept. 10, 1992.

*863 Peter Hill, Orlando, FL, for debtor.

George E. Mills, Jr., Orlando, FL, trustee.

Leigh R. Meininger, Orlando, FL, for trustee.

David E. Peterson, Orlando, FL, for First Union Nat. Bank of FL.

Samuel J. Zusmann, Orlando, FL, for Transamerica Commercial Finance Corp.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

HENRY H. DICKINSON, Bankruptcy Judge.

To paraphrase an old saying "a debtor's homestead exemption is his castle." This matter is currently before the Court on the parties cross motions for summary judgment on the debtors' claimed homestead exemption. The specific question posed to the Court is how may a debtor, under Florida law, lay out his castle.

On November 30, 1990, Charles F. Edwards, Trustee, First Union National Bank of Florida, and Transamerica Commercial Finance Corporation ("objectors") moved to deny various exemptions of property claimed by the debtors, Edward W. Englander and Phyllis S. Englander (Document No. 34). The debtors responded on December 19, 1990 (Document No. 44). The objectors moved for summary judgment on the homestead exemption issue on March 29, 1991 (Document No. 79), and the debtors cross-moved for summary judgment on April 22, 1991 (Document No. 100). The parties have agreed and stipulated that there are no genuine issues of material fact and that this matter is ripe for resolution on the cross motions for summary judgment.

UNDISPUTED FACTS

On or about September 27, 1990, Edward and Phyllis Englander ("debtors") filed a joint petition under Chapter 7 of the Bankruptcy Code. In their petition, as amended the debtors listed approximately $16,750,000.00 in total Liabilities and $7,700,000.00 in total assets. The debtors also claimed over $2,400,000.00 as exempt property including their residence at 440 Henkel Circle in Winter Park, Florida ("residence") in which they claim their homestead exemption. [FN1] In their initial bankruptcy schedules the debtors claimed their entire homestead exempt. This claim of a homestead exemption in the entire residence was without any legal basis as the residence's acreage greatly exceeded the allowable amount which could be exempted under Florida Law.

> FN1. The Court notes in passing that the debtors listed the value of their home in May 1988, at $900,000.00 while listing its value at only $700,000.00 in their September 1990 schedules.

The residence in question lies within the city limits of Winter Park, Florida. The ***864** property is located on a lake front tract and contains a one story residence and a detached two story garage which the debtors rent to a third party. The parties agree that the tract of land on which the residence is located cannot be subdivided due to local zoning and building regulations.

On November 30, 1990, the objectors timely filed their formal objections to various exemptions claimed by the debtors including the homestead exemption. In their answer to the objection the debtors "admitted" that the size of the homestead was .57 acres, slightly larger that the .5 acres allowable as a homestead under Florida law. [FN2]

> FN2. Art. 10, § 4(a)(1) provides: "(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon except for the payment of taxes and assessments thereon, obligation contracted for the purchase, improvement or repair thereof, or obligations contracted for the house, field or other labor performed on the realty, the following property owned by a natural person: (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family"

Later in this proceeding, the debtors reluctantly admitted that

their previous statements concerning the size of the lot upon which their residence was located had been "in error" and on the basis of a survey admitted that the actual size of the lot was 1.05 acres, more than twice the acreage allowable as an exemption under Florida Law.

On March 28, 1991, the debtors filed a "Notice of Second Amendment" to schedule B-4 [Exemptions]". This second amendment attempted to further "clarify" the exact legal description of the property claimed exempt by the debtors in the tract containing their residence. While the legal description contained in the second amendment was hopelessly defective, pleadings later filed by the objectors included a survey map showing the exact property claimed exempt by the debtors (see attached Exhibit "A").

As can be clearly noted from Exhibit A, the .5 acres in which the debtors claim an exemption totally surrounds the .55 acres of the residence in which the debtors cannot claim an exemption. This designation of exempt property by the debtors renders the non-exempt tract worthless since there is no access to roads, utilities or lake frontage. It is clear that the non- exempt tract, as cunningly configured by the debtors, can neither be conveyed by a recordable deed nor could a house or any other improvements be built there. From its review of the pleadings, this Court finds that the debtors' designation of the exempt portion of the debtor residence was specifically made in order to eliminate any value which the non-exempt tract might have with the intent to defraud their creditors. See generally, Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871 (8th Cir.1988). This attempt at homestead exemption "gerrymandering" was clearly made in bad faith.

LEGAL DISCUSSION

In the present action the Court is faced with four legal questions:

1.) Should the debtors be permitted to Amend their original claim of exemption?;

2.) Are the debtors entitled to a homestead exemption in the garage apartment rental property?;

3.) Do debtors have an absolute right to designate their State law homestead in any contiguous shape without regard to the rights of their creditors to the non-exempt tract?; and

4.) If a property is not legally and/or factually divisible between exempt homestead and non-exempt excess real property, does the Trustee, as a co-owner of the property, have the legal right to sell the property?

The Court shall address these legal issues in order.

1.) THE AMENDED B-4 SCHEDULE

The first issue is the propriety of the debtors' amendment of their schedules to specifically designate .50 acres as homestead ***865** rather than the entire 1.05 acres as originally designated in the petition. The objectors' argue that the filing of the original schedule was the debtors' designation of a homestead exemption under Section 222.02 of the Florida Statutes and that no amendment to that declaration should be allowed. While it may be true that the filing of a bankruptcy petition is analogous to the levy described in that statute, this Court believes that F.R.B.P. 1009(a) and 4003(b) clearly contemplate amendments to exemption schedules and all

relevant case law indicates that such amendments to claimed exemption to be liberally allowed. Therefore this Court recognizes the debtors' right to amend their claim of homestead exemption. However, it is important to note that allowing an amendment claiming an exemption is extremely different from allowing the exemption itself.

2.) THE GARAGE APARTMENT

The next issue before the Court, concerns the portion of the residence claimed as exempt which contains a garage apartment, which is rented by the debtors on a month to month basis. The objectors assert that because the apartment is rented out, it does not qualify as homestead under the Florida Constitution. The Constitution provides that "[T]here shall be exempt from forced sale under process of any court ... (1) a homestead, ... if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family...." FLA. CONST. art. X § 4 (1968).

The starting point of this Court's analysis of this minor point is whether the garage itself qualifies as homestead property. Garages, either detached from or attached to a home are "conventional residential appurtenances--all well within the ambit of the Constitution homestead exemption." White v. Posick, 150 So.2d 263, 265 (Fla.C.A., 1963). In White, a swimming pool and a screened patio were given homestead status as an integral appurtenance, and the garage used by the debtors in this case is no different. This court agrees with the Florida Supreme Court's statement in Armour & Company v. Hulvey, 73 Fla. 294, 74 So. 212 (Fla.1917) that "the exemption of a half acre within the limits of any incorporated city or town would doubtless include such outhouses, barns,

wagon houses, garages, wood or coal sheds, chicken houses and fences, etc., as were appurtenant and subsidiary to and used in connection with the residence as conveniences and auxiliaries, although they are not expressly mentioned as being included in such exemption." See also, 1952 Op.Att'y Gen. 352.

The apartment situated above the garage is more troublesome. The original constitutional provision allowed an exemption for urban property that was the "residence and business house of the owner." FLA. CONST. art. X § 1 (1885, amended 1968). The Constitution currently allows an exemption only for the owner's residence. Judge Paskay in In re Aliotta, 68 B.R. 281 (Bank.M.D.Fla.1986) held that the "elimination of the business property reference from Article X, § 4 shows unequivocal intent to limit homestead exemptions to the residence of the owner and to disallow any claim for an exemption that exceeds the residence of the owner." Id. at 282.

The controversy over the homestead status of garage apartments is not a new one. In Smith v. Guckenheimer, 42 Fla. 1, 27 So. 900 (Fla.1900), the Florida Supreme Court denied the homestead exemption as to a portion of a two story building by "dividing the building by perpendicular lines" to allow the claimant to have a residence over his business house. Id. at 27 So. 901. In Smith, the claimant owned a two story building with five ground-floor storefronts and bedrooms on the second floor. The claimants' storefront was directly below their residence such that a perpendicular or vertical line could be drawn separating the claimants' residence and storefront from the other tenants' storerooms. Id.

The Florida Supreme Court retreated from the strictness of the

Smith decision in Cowdery v. Herring, 106 Fla. 567, 143 So. 433 (1932). In Cowdery, the homestead claimant owned a residence as well as a ***866** commercial garage and storage building. The Court held that under the old constitutional provision, these buildings could be classified as the owner's business house and therefore were entitled to homestead status. Id. at 143 So. 435.

The reasoning in Cowdery was criticized seven years later in McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939), where the Florida Supreme Court stated that an apartment house for rent is not a business house, but that Cowdery was not inconsistent because the garage there "had been used as a part of the city homestead property," whereas in McEwen, the owner built the apartment house and garage for rental purposes. Id. at 185 So. 868. Thus, the determining factor became whether or not the owner intended to rent the improvement when it was added to homestead property. Thus, in McEwen, the homestead exemption as to the apartment house and its underlying land was abandoned by the owner when the apartment house was built. Id.

The Smith doctrine was applied to the owner's benefit in Lockhart v. Sassier, 156 Fla. 339, 22 So.2d 763 (1945). In Lockhart, the owner built a six unit apartment house and resided in the ground floor unit. The Court held that since the "entire house was under one roof and was not divisible by a perpendicular line without destroying or eliminating" the owner's home, the entire property was entitled to homestead protection. Id., 22 So.2d at 764. Neither Cowdery nor McEwen were applied by the court because they both dealt with improvements unattached to the residence of the owner. Id.

The Florida Supreme Court again returned to the Cowdery reasoning that rental property can constitute an owner's business house in Union Trust Company v. Glunt, 85 So.2d 877 (Fla.1956). The Court held that the residence and business house language in the 1885 Constitution was flexible enough to include the different trades owners might have. Id. at 879. The Court stated that "garage apartments are frequently placed adjacent to the home for rental as well as utility purposes." Id.; see, White v. Posick, 150 So.2d 263, 265 (Fla.C.A.1963) ("the usages of defendant's garage apartment were ... within the "utility" classification set out in the Glunt case"); see also, Weiss v. Stone, 220 So.2d 403 (Fla.C.A.1969) (determination of homestead character when partially residential and the rest income producing is factual one).

After the 1968 amendment, which removed the business house language from the exemption, only a few cases have dealt with the rental apartment issue. Judge Britton in In re Rodriguez, 55 B.R. 519 (Bank.S.D.Fla.1985) held that a portion of a free-standing one-story building which was rented on a monthly basis was not entitled to the homestead exemption. Id. at 520. The building in Rodriquez had an internal wall between the portion used by the debtors and the portion rented out. Also, the rental unit had a separate entrance. Id. Thus, it appears that the Smith and Lockhart analysis regarding the severing by perpendicular lines survived the constitutional amendment, although those cases were not cited by the Rodriguez court.

Judge Cristol criticized the Smith and Lockhart reasoning in In re Kuver, 70 B.R. 190 (Bank.S.D.Fla.1986). In Kuver, the debtors resided in half of the duplex they owned. The other half was rented to tenants for monthly rent. Id. at 191.

The Court reasoned that the perpendicular line analysis of Smith and Lockhart was antiquated in light of the modern view on condominium ownership; "A condominium complex may be divided vertically and horizontally and freely conveyed." Id. The Court's new test states that "a unit which is both susceptible to division by perpendicular lines, horizontal lines, or both, and lawfully conveyable as an independent parcel under existing law should be the criteria for the divisibility." Id. at 193. The Court then applied the new test and found that although the duplex was susceptible to division it was not lawfully saleable because of existing zoning laws. The court therefore held that the entire duplex building was entitled to homestead status. Id. In In re Makarewicz, 126 B.R. 127 (Bank.S.D.Fla.*867 1991), Judge Cristol confirmed the reasoning in Kuver. Id. at 129.

A little more than two weeks after Kuver was decided, Judge Paskay followed the Rodriguez reasoning in In re Aliotta, 68 B.R. 281 (Bank.M.D.Fla.1986). In Aliotta, the debtors resided in one of four units of an apartment building they owned. The court held that the trustee could sell the other three units even though they were attached to the debtors' residence. The court stated "that the mere fact that the claimant occupies part of the property as a residence is not enough to entitle him to an exemption for the whole." Id. at 282. In this opinion the Court took a facts and circumstances approach to determine whether the rental property attached or located on the same tract as the residence could be subject to homestead exemption.

In the present matter, the garage apartment should be given homestead status. This Court adopts the "Facts and Circumstances" analysis of Rodriguez, Aliotta, Cowdery, McEwen, and Glunt, and finds that the garage apartment was

built on homestead property for utility purposes and not rental purposes. The Court holds that hard and fast tests for determining homestead exemptions proposed by other Courts do not take into account the unique factual circumstances which necessarily arise in every homestead claim. This determination however will have little impact in this case given the Court rulings on the remaining issues. Thus, the garage apartment falls within the ambit of the homestead exemption.

3.) DESIGNATION OF THE HALF ACRE

The next and most important issue before the court is the designation by the debtors of .50 acres in the configuration set forth in exhibit "A" as their homestead. The objectors assert that the debtors cannot select the shape of the half acre in such a way as to effectively prevent the division of the residence or to eliminate all access of the remaining nonexempt .55 acres. In response, the debtors cite Frase v. Branch, 362 So.2d 317 (Fla.C.A.1978) where the court stated, "generally, the landowner has a right to select his homestead in any contiguous shape from his qualifying lands." Id. at 320. Based on this single sentence, the debtors' cavalierly argue that they have an unlimited right to designate any .50 acres of any municipal tract without any regard for their creditors' rights or claims.

In considering these two radically different legal positions it is critical for this Court to analyze the background and statutory purpose of Florida's homestead exemption.

Courts have uniformly held that the purpose of Florida's homestead exemption law is to protect debtors and their dependents from destitution, even in the face of valid

creditors' claims. Brown v. Lewis, 520 F.Supp. 1114 (M.D.Fla.1981); Matter of Hersch, 23 B.R. 42 (Bankr.M.D.Fla.1982); Frase v. Branch, 362 So.2d 317 (Fla.C.A.1978). Further the laws governing the exemption provisions have been liberally construed to achieve these purposes. Frase v. Branch, 362 So.2d at 320. However Courts are also uniform in holding that Florida's generous homestead exemption law should not become "instruments of fraud" Frase v. Branch, 362 So.2d at 317, to deprive creditors of funds to which they were entitled. Brown v. Lewis, 520 F.Supp. at 1114. Here this Court has found that the debtors have acted in bad faith and with the clear intent to defraud his creditors by their conduct concerning the pleading of their homestead exemption.

Here the debtors originally claimed that the entire tract of land on which their residence was located was exempt. Had no timely objection to the original claim of an exemption been filed, the exemption would have been allowed, even though there was no legal basis for the exemption. Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). The debtors later "clarified" this claim to state that their residence was located on a tract only .07 acres more that the .50 acres allowed as a homestead exemption under Florida Law. It was only in March of 1991, approximately ***868** 6 months after their bankruptcy was filed, that the debtors truthfully and accurately revealed to the Court the true size of the tract of land on which their residence was located.

After this slow process of disclosure of the actual size of the tract of land on which their homestead was located the debtors adopted a new tactic to prevent any portion of the residence to be made available for their creditors' claims. On March 28,

1991 the debtors filed their second amendment to their exemptions which claimed to designate their exempt portion of the tract where their residence was located. The exempt tract was configured in such a shape as to legally and practically eliminate any reasonable value from the non-exempt tract (see attached Exhibit A). Drawing on the old saying paraphrased at the beginning of this opinion, the debtors have by their designation of the exempt portion of their residence have not protected their castle with the moat of their homestead exemption but are instead attempting to illegally deprive their creditors of the value of the non-exempt tract by constructing siege lines around it. Florida's homestead law, while generous, does not permit the designation of a homestead on a larger tract of land when that designation will render the nonexempt portion valueless or eliminate any reasonable access to the non-exempt property.

The statement in Frase that the debtors rely on in this case is clearly dicta, as the shape of the tract chosen by the debtor was not the main issue before the Court. Further, Frase did not indicate that a debtors right of designation was unlimited. This Court chooses to follow the reasoning of the Florida Supreme Court in Shone v. Bellmore, 75 Fla. 515, 78 So. 605 (1918) concerning a debtor's right to shape an exempt homestead. The Bellmore Court stated:

> There is no expression from this court to be found in its opinions that the tract of land constituting a homestead shall be in any particular shape, nor ... that they shall be contiguous or adjacent ... for their full length. It may be that in a case where a man resides with his family upon a very large farm, and is called upon to select his homestead ... he would be restrained by a rule requiring reasonable exercise of the right from selecting his homestead in narrow strips of land

> to running through the entire tract in fanciful, queer, whimsical contortions, making a grotesque figure ...

Id. at 78 So. 608. Here, the selection by the debtors is not a reasonable exercise of their homestead rights as the shape chosen prevents all access, other than by helicopter, to the remaining parcel. Therefore, the designation as it stands now is improper.

4.) CAN ANY SPECIFIC .50 ACRE BE DESIGNATED AS THE DEBTORS HOMESTEAD?

The final issue is even if a designation of the .50 acres were to be done in a manner to allow access to roads, utilities and other property, would such a designation be permitted where, as the parties agreed, local laws would render a non-exempt tract to be untransferable and therefore effectively allow the debtors to keep property in excess of that allowed by the Florida Constitution. Section 222.02 of the Florida Statutes suggests that once a landowner designates a portion of their property as homestead the "remainder only shall be subject to sale." Fla.Stat.Ann. § 222.02 (1989). The statutory process is more complicated in this case because the existing zoning laws of the city of Winter Park prevent the subdivision of the property. Thus, the value of the .55 acres non-exempt tract is at best insignificant, since it can't be transferred without an unlikely and possibly illegal variance.

In essence, the final issue before this Court is whether debtors may keep a tract of land in excess of the half acre provided by the Florida Constitution because the zoning laws of a municipality prevent the subdivision and sale of the non-exempt portion of debtors' lands. This Court holds that they may not. The Florida Constitution allows a homestead

exemption "to the extent of one- half acre of contiguous property." FLA. CONST. art. X § 4. This *869 area limitation is the inexorable command of the Constitution.

There is a vast difference between the half acre limit and the more flexible limitation that the exemption extends only to the residence of the owner. If the residence limitation were read strictly, landowners would not be entitled to a half acre exemption unless their residence itself was a half acre. Also, no rental land would be exempt no matter how insignificant or indivisible it is from the residence. A strict construction of that limitation has never been applied by the courts of this state. See Edward Leasing Corp. v. Uhliq, 652 F.Supp. 1409, 1416-1417 (S.D.Fla.1987).

In contrast, the half acre limitation must be enforced more stringently. Neither the objectors nor the debtors have cited any case and this Court has not found any case where a Florida court refused to enforce the half acre limitation. The debtors' claim that In re Kuver, 70 B.R. 190 (Bank.S.D.Fla.1986) and In re Makarewicz, 126 B.R. 127 (Bank.S.D.Fla.1991) support this proposition misstate the holdings in these cases.

If the land at issue here were not within a municipality this Court would apply the process given in the Florida Statutes. See Fla.Stat.Ann. § 222.03 (1989). This method allows the owner to designate the exempt property up to the 160 acres permitted by the Florida Constitution. FLA. CONST. art. X § 4. The remaining portion of the owner's land can then be set apart and sold to satisfy the creditors. Fla.Stat.Ann. § 222.03 (1989); see, Frase v. Branch, 362 So.2d 317. However, lands outside municipalities are seldom subject to strict zoning laws that prohibit the subdivision and sale of

parcels, although the use of rural lands is often severely restricted by environmental laws. In a Vermont case, In re Evans, 51 B.R. 47 (Bank.D.Vt.1985), the Court was faced with a similar issue where environmental laws prevented the division of a parcel of land only partially exempt. Nevertheless, the court held that the trustee should sell the entire parcel and allocate the proceeds to the debtors in the amount allowed under Vermont law. Id. at 51. The Evans court stated that "subdivision is not crucial to the protection of the homestead exemption of the debtor." Id. The Vermont homestead exemption did not limit the area of the homestead but instead limited the value of the homestead to $30,000. Id. at 50.

The Evans court determined that if it did not sanction the sale of the entire parcel, the debtor would have retained a homestead in excess of the express dollar limitation. Likewise, in the instant case the debtors would retain a homestead in excess of the express size limitation in the Florida Constitution, unless the tract upon which the residence is located were sold and some equitable allocation of the proceeds is made.

Similarly, in Title Insurance Co. of Minnesota v. Agora Leases, Inc., 320 N.W.2d 884 (Minn.1982), the Court was faced with a debtor whose residence was located on .77 acres of urban land she owned. A judgment lien was imposed upon this land and a suit was instituted to remove this cloud on the title. Id. The Minnesota Homestead law provided that if the property claimed is within a city "its area shall not exceed on half of an acre." Minn.Stat. § 510.02 (1980). The land in excess of the half acre was not saleable or usable as an independent parcel because city ordinances prevented building on such a small lot and because the lot would not have a

separate access. Id. The debtors, therefore, asserted that because the excess was essentially valueless property they should be entitled to keep it. The Minnesota Supreme Court rejected this assertion because the statute spoke in terms of area not value, so the value of the excess parcel was irrelevant. Id. at 885. The Court stated that the parcel was hardly de minimis in that it was half as much acreage as allowed under the Minnesota exemption. Thus, the lien could not be removed as a cloud on the title to the land. Id.

Like the excess parcel in Agora Leases, the .55 acres of the tract containing the debtors' residence cannot be retained by the debtors as homestead under the acreage limitations of Florida Law. Further ***870** the exempt tract is not independently saleable and thus has minimal value in its own right. Under the Agora Leases analysis, this Court rejects any attempt by the debtor to retain possession of the .55 acres free of the estate's interest in non-exempt assets. Although the Agora Leases Court did not have to order the sale of the entire tract, as it had already been sold, such a sale was done in another Minnesota case, O'Brien v. Heggen, 705 F.2d 1001 (8th Cir.1983).

In O'Brien, a debtor owned a lakeshore lot of approximately 40,000 square feet containing his residence. The Bankruptcy Court ordered the sale of the entire lot and that the proceeds be allocated as either exempt or non-exempt funds. The debtor then made a hypothetical selection of a portion of the previously sold lot as exempt. Id. at 1002. Under this selection the non- designated portion would not have had access to a public road and would have been improper under the city ordinance because it would have been too small. The Minnesota District Court affirmed the Bankruptcy Court's allocation of the sale proceeds. Id. The Eighth Circuit Court

of Appeals, in affirming the District Court, stated that the Bankruptcy Court's apportionment "allows an appropriate recognition of debtor's homestead exemption and yet affords creditors some satisfaction of their rightful claims." Id. at 1004. The court commented that creditors benefited "because there would have been no reasonable or feasible way of dividing the property and giving the non-exempt part any value: minimum lot size requirements, irregular topography, and problems of accessibility would have rendered any physical division of the property impractical." Id.

This Court is persuaded that the O'Brien reasoning should control the instant case. The property cannot be practically or legally divided and a sale of the entire parcel with an accompanying apportionment of the proceeds is an "eminently fair resolution." Id. Through such a sale the debtors will receive the value of their homestead land, which will retain its exempt status under the doctrine of Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201 (Fla.1962). The debtors can then repurchase a homestead or bid in their exemption at the sale thereby fulfilling the purpose of the Florida homestead exemption law by providing shelter for debtors and their family. Id. at 204. The creditors will benefit as the Trustee will recover the proceeds of the nonexempt tract for distribution.

These debtors argue that the literal language of the Florida Constitution prohibits sales not listed in article X of the Constitution. FLA. CONST. art. X § 4. However, such a strict construction has not been applied by the courts. The Florida Supreme Court has allowed judicial sales of homesteads where there exists an equitable mortgage or when a sale is necessary to protect a co-owner's beneficial interest in the homestead. See, Sonneman v. Tuszynski, 139 Fla.

824, 191 So. 18 (1939); Tullis v. Tullis, 360 So.2d 375 (Fla.1978). Here the Bankruptcy trustee's interest in the residence is similar to that of a co-owner given that the property can't be partitioned and the trustee has an ownership interest in the non-exempt portion. Further in the instant case a judicial sale is necessary to enforce the homestead limitation of the Florida Constitution itself. The homestead exemption cannot be used, even in conjunction with zoning laws, to unjustly impose upon the rights of creditors. See, Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 13 So.2d 448 (1943).

VALUATION

The parties have not asked this court to value the exemption and therefore, this Court makes no determination as to the value of the exempt and non-exempt portions of the property. Further this Court expressly reserves ruling as to the proper manner of allocating any subsequent proceeds from any sale of the residence. The Court gives the parties until October 20, 1992, to file with this Court an agreement and related pleadings concerning the allocation of sale proceeds. If no agreement is filed the parties are directed to file simultaneous briefs on the issue of allocation on or *871 before October 30, 1992. A hearing on the issue of allocation if necessary, will be set on the November 16, 1992.

In the present action the debtors have, at every turn attempted to limit the amount of assets available for distribution to their creditors by first misidentifying the size of their homestead and later partitioning the tract containing his residence in such a manner as to render the nonexempt portion of that tract valueless. These actions are not the actions of an honest debtor merely availing himself of the liberal homestead

exemption laws of the State of Florida but rather the actions of a greedy individual who wishes to obtain an unconscionable windfall by turning a homestead exemption, enacted to prevent the impoverishment of families, into an instrument of fraud with which he can improperly deprive his creditors of an asset with a value of at least several hundred thousand dollars, based on the debtors own valuation.

The misleading and fraudulent actions discussed above could have resulted in a total denial of the debtors right to claim a homestead exemption in his residence. See generally, Hardage v. Herring Nat. Bank, 837 F.2d 1319 (5th Cir.1988); In re Williamson, 804 F.2d 1355 (5th Cir.1986); In re Doan, 672 F.2d 831 (11th Cir.1982). However since the issues in this case had not been directly addressed by a Court construing Florida law before today and one court, in dicta, indicated that a debtor had great leeway in selecting the shape of his homestead, this Court believes that total elimination of his homestead is too severe a punishment and holds that these debtors should be allowed to claim a fair share of the proceeds from the sale of their residence. As noted by the Bankruptcy Court in In re Zouhar, 10 B.R. 154 (Bank.D.N.M.1981) "there is a principle of too much; phrased colloquially, when a pig becomes a hog it is slaughtered". Id. at 157. Here the Court shall not "slaughter" the debtors but shall instead deny their improperly claimed homestead exemption and grant the debtors leave to file one final amendment to their homestead exemption setting forth their claim. The choice of being pigs or hogs is left to the debtors and their counsel.

DONE and ORDERED.